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Division Bench (Criminal)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR (M.P.).

CRIMINAL APPEAL NO. 370 OF 1999.

CRIMINAL APPEAL UNDER SECTION 374(2) OF CRIMINAL
PROCEDURE CODE.

APPELLANT : MANTRAM @ MANGTU SON OF JHAMMERAM,
Aged about 32 years, Cook, resident
of Nayapara, Police Station
Chakarbhata, District Bilaspur.

- v e r s u s -

RESPONDENT : THE STATE OF MADHYA PRADESH.

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5/2/99

S. Sharma

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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.370 of 1999

Mantram @ Mangtu

Vs.

The State of M.P. (now Chhattisgarh)

JUDGMENT

For consideration

Sd/-

Sunil Kumar Sinha

Judge

10.7.2005

Hon'le Shri Justice L.C.Bhadoo

g. agree

Sd/-

L.C.BHADOO

Judge

10/7.2005

Post for 11.07.2005

Sd/-

Judge,

10.07.2005

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HIGH COURT OF CHHATTISGARH AT BILASPUR

(DIVISION BENCH)

**Coram : Hon'ble Shri L.C. Bhadoo &
Hon'ble Shri Sunil Kumar Sinha, JJ**

Criminal Appeal No.370 of 1999

Mantram @ Mangtu

Vs.

The State of Madhya Pradesh (now Chhattisgarh)

Appearance:

Miss. Dipali Pandey, counsel for the appellant.

Shri Akhil Mishra, Panel Lawyer for the State.

JUDGMENT

(Delivered on || July 2005)

Sunil Kumar Sinha, J,

This appeal has been directed against the judgment of conviction and order of sentence dated 09.1.1999 passed by the second Addl. Sessions Judge, Bilaspur in Sessions Trial No.364/1998 whereby the appellant has been convicted u/s 302 of the IPC and has been sentenced to undergo life imprisonment and to pay a fine of Rs.100/-, in default of payment of fine to further undergo simple imprisonment for 15 days.

(2) The brief facts are that the deceased namely Smt. Savitri Bai was living along-with her husband namely Mantram (the appellant) in village Nayapara. In the intervening night of

14-15th March 1998, Savitribai has gone to see Video Film near her neighbors house namely Shubhdas on the occasion of 'Chatthi' (sixth day's ceremony after the birth) being celebrated in his house. She returned back at about 3 a.m. The appellant asked her as to why she has gone to see the video without his permission. He assaulted her and thereafter with an intention to kill her, he poured kerosene oil on her and put her to fire. This matter was informed to Police Station Chakrabata by one Ram Kumar Ghorl at about 5 a.m. which was reduced into writing in *Rosnamcha Sanha* dated 15.3.1998 vide Ex.P.5. A *Dehatinalishi* was also recorded at 5.35 a.m. on 15.3.1998 by the Police vide Ex.P.6 when the Police visited the place of occurrence. This *Nalishi* was lodged by the deceased herself in which the entire story, as above, was narrated and it was stated that the appellant put her to fire after pouring kerosene oil on her. It appears that the deceased was admitted to Sardar Patel Hospital, Bilaspur on 15.3.1998 at about 6.40 a.m. She was medically examined and the burn was found to be 68%. On 17.3.1998 at 3 p.m., the Executive Magistrate recorded her dying declaration vide Ex.P.13 in which also she made all allegations against her husband and declared that her husband was having some suspicion regarding her character and for this only, he poured kerosene oil and set her on fire. She remained alive in the Hospital till 25.3.1998 but ultimately she succumbed to the injuries at about 6.30 a.m. on the said day. The postmortem was conducted on the same day and the cause of death has been shown to be Septicemia due to burn

injuries. After investigation, the charge sheet was filed u/s 302 IPC and the matter was committed to the Court of Sessions for trial.

(3) The learned trial Judge after completion of the trial convicted the appellant u/s 302 IPC and sentenced him as aforementioned. The conviction is based on the dying declaration made by the deceased vide Ex.P.13. The trial Court has believed the contents of the dying declaration holding it to be true and correct.

(4) Learned counsel for the appellant, referring to the decision of Rajasthan High Court in the case of Shahabuddin -Vs- The State of Rajasthan 1973 Cri.L.J. 723 submits that the dying declaration is not true. It does not fulfill the test of its truthfulness and the same was not believable. The Sessions Court committed an error of law by holding the declaration to be true and proved. She submits that the dying declaration must be tested by independent evidence that the declarant was mentally conscious and possessed memory or intelligence, sufficient to know what he or she was doing and saying. She also submits that the Doctor has not given a certificate before recording the dying declaration that the deceased was in a fit mental condition to give the dying declaration. The Doctor has only certified in the dying declaration to the effect "that the deceased was conscious during the entire period consumed for recording the dying declaration that is from 3.05 p.m to 3.30 p.m., on 17.3.1998". She submits that this is not a sufficient

certificate to hold that the deceased was mentally fit while she was giving the declaration. She also submits that the Doctor who has given a certificate regarding consciousness during the course of dying declaration has not been examined in this case and an adverse inference should be drawn against the prosecution. She also submits that the conduct of the appellant is of a great importance as after the said mishappening the appellant himself went to the family members of the deceased and has informed them about the incident. She refers to Para 9 of the decision of Division Bench of Rajasthan High Court in the matter of Sagir Khan -Vs- State of Rajasthan 1999 Cril.L.J. 1705.

(5) We have heard learned counsel for the appellant as well as the counsel for the State at length and have also perused the records of the case. The principles regarding testing veracity of the dying declaration are well settled. Since the admissibility of the dying declaration is not subject to the cross examination of the maker, a strictest scrutiny and closest circumspection is required by the Court before acting upon it. In the matter of K.R. Reddy and another -vs- The Public Prosecutor, AIR 1976 S.C. 1994, the Apex Court observed that while great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person, yet the court has to be on guard against the statement of the deceased being a result of either tutoring,

prompting or a product of his imagination. It has further been observed that the Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. It has also been observed that once the court is satisfied that the dying declaration is true and voluntary it can be sufficient to found the conviction even without any further corroboration. In this very judgment, the Apex Court further observed that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement by circumstances beyond his control; the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

- (6) The Apex Court in the matter of **P.V. Radhakrishna -vs- State of Karnataka, AIR 2003 S.C. 2859** held that the general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone,

when every motive to falsehood is silenced and the mind is induced by the most powerful considerations to speak the truth. The principle on which the dying declaration is admitted in evidence is indicated in legal maxim "*nemo moriturus proesumitur mentiri* - a man will not meet his maker with a lie in his mouth."

(7) In the background of above principles, if we examine the reliability of the dying declaration, first of all, it has to be decided as to whether the declarant was in a fit state of mind to make the dying declaration or not? For this purpose, if we look into the dying declaration (Ex.P.13) it would be clear that the dying declaration was recorded by the Executive Magistrate on 17.3.1998 in between 3.05 p.m. to 3.30 p.m. On the left side at the bottom of the said document, a certification has been given by one Dr.R.Jeetpure at 3.30 p.m. by making an endorsement that the declarant was conscious during the entire period consumed for recording dying declaration i.e., 3.05 - 3.30 p.m. Learned counsel argues that though the certificate indicates that the deceased was through out conscious, but it does not indicate that she was mentally fit to give the dying declaration, therefore, it cannot be said that the deceased was in a fit state of mind to make the declaration. This point is to be tested in the light of Constitutional Bench decision of the Apex Court rendered in a matter of Laxman -Vs- State of Maharashtra (2002) 6 SCC 710. This was a reference made to the Apex Court in which almost a similar question has cropped up as to whether the certificate of Doctor to the effect that the patient is

conscious and there was no certification that the patient was in fit state of mind at the time of making the declaration makes the declaration unacceptable and the subjective satisfaction of the Magistrate recording the dying declaration that injured was in a fit state of mind at the time of making declaration cannot be relied on, is the correct enunciation of law ? The apex Court after considering the entire matter held that normally, the Court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. The apex Court further held that the dying declaration can be oral or in writing and adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. It has also been stated that there is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by

the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the Court ultimately holds the same to be voluntary and truthful. The apex Court has further held that a certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise. The apex Court replied the reference in terms that "In the absence of medical certification that the injured was in a fit state of mind at the time of making declaration, it would be very much risky to accept the subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind at the time of making declaration", is not correct enunciation of law.

(8) In view of the above decision of the Apex Court, we hold that a certification of the Doctor to this effect that the patient was conscious and not to this effect that the patient was in a fit state of mind to make a dying declaration would make no difference in the matter if the dying declaration is proved otherwise in accordance with law and is ultimately held to be voluntary and truthful. Now if we see the dying declaration on its face it would appear that it has been recorded in a question and answer form. The Magistrate has put up one introductory question about name etc and a positive answer has been recorded in the language of the declarant who deposes her name with the name of the husband, her age, occupation and

place of residence alongwith the police station in the specified manner. We find that on the basis of record all these particulars are correct. After this a second question has been asked which is in relation to the incident which took place on 15.3.1998 and the deceased has categorically replied that the husband on the suspicion of her character, poured Kerosene Oil on her and thereafter put her to fire. The Executive Magistrate has been examined as P.W.9. He has also stated in his evidence that before recording the dying declaration, he got the declarant examined by the Doctor and when the doctor certified that the patient was in a fit mental condition to think, understand and speak, then only, he recorded the dying declaration. There has been no cross examination of this witness regarding the mental fitness etc., of the deceased and only one suggestion has been put to him that the said dying declaration was recorded after asking the relatives of the deceased. It appears to us that on being called by the Police and after being satisfied about the fit mental condition of the deceased with the assistance of the Doctor and after putting introductory question about the identification etc., the Executive Magistrate has recorded this dying declaration after subjective satisfaction which shows that the declarant was in a fit mental condition to give such a declaration and the arguments that the deceased was not in a fit mental condition cannot be accepted.

(9) Now coming to the next question regarding non-examination of the doctor who gave the certification on the dying declaration, the judgment of the Apex Court rendered in the matter of **Shanmugam @ Kulandaivelu -Vs- State of Tamilnadu AIR 2003 S.C. 209** is referable in which the Apex Court has held that when the dying declaration was recorded after satisfaction of the Magistrate regarding consciousness of the deceased and his position to make the statement and the Doctor also made an endorsement on the dying declaration about the consciousness of the patient, the mere fact that the doctor in whose presence the dying declaration was recorded was not examined does not affect the evidenciary value to be attached to the dying declaration. We also hold that the non-examination of the doctor who gave certificate on the dying declaration will make no effect on the evidenciary value of dying declaration if it is otherwise proved to be true and trustworthy on the basis of statement of the Executive Magistrate and on the basis of other supporting circumstances in this case.

(10) Now we come to the question of possibility of tutoring of the deceased and also the other circumstances on which the reliability of the dying declaration can be tested. If we examine the record, it would appear that just after the incident, at 5 a.m. on 15.3.1998 a report of this mishappening was given to the Police Station by one Ramkumar. This report was reduced into writing in *Rosnamcha Sanha* No.514 dated 15.3.1998

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which has been proved as Ex.P.5. The contents of *Sanha* also support the story of the prosecution to the effect of burning the deceased by the appellant. This was the first report with the Police which ultimately supports the dying declaration. Not only this, a *Dehati Nalishi* was also recorded on the same day at about 5.35 a.m. vide Ex. P-6 when the Police went to the spot. This *Nalishi* was lodged by the deceased herself in which the deceased made almost the same allegations against the appellant. This further corroborates the contents of the dying declaration. It appears that *Dehati Nalishi* was recorded before Ramkumar (P.W.4) who is the neighbor of the deceased. He has categorically stated in Para 2 of his evidence that the deceased has lodged the report making allegations against her husband to the extent of causing burn injuries to her after pouring Kerosene oil on her and such statement was recorded by the police before him. He has also stated that the deceased had put thumb impression on the said statement and has further categorically stated that the deceased was fully conscious while giving this statement of *Rosnamcha Sanha* Ex.P.6. In fact, he is an eyewitness of lodging of this *Rosnamcha Sanha* by the deceased to the Police on 15-3-1998 at 5.35 a.m. In our opinion, this was the earliest opportunity to the deceased to make her statement before the Police and that too in presence of witness Ramkumar (P.W.4) who has categorically stated that the deceased was fully conscious while making this statement that her husband put her to fire after pouring Kerosene Oil on her. It is very important to mention

this fact here that this witness Ramkumar (P.W.4) has not been cross-examined by the defence on any point against his said version and surprisingly his cross examination has been marked as 'NIL'.

In the facts and circumstances as mentioned above, the question of tutoring the deceased does not arise. There was no opportunity with the relatives of the deceased to tutor her because she has made her statement to the police at the earliest opportunity on the basis of which *Dehati Nalishi* was recorded at about 5.35 a.m. on the same day. This statement is almost identical to the statement made in the dying declaration on 17.3.1998 and also to the contents of first hand information to the police vide *Rosnamcha Sanha* dated 15.3.1998 which was recorded at 5.00 a.m. In the facts and circumstances, since all the statements are identical and the earlier statements were recorded in the shortest time, we cannot say that there was any chance of tutoring the deceased for making any false dying declaration on 17.3.1998.

(11) On the basis of above facts and circumstances and also on the basis of the corroborative pieces of evidence i.e., *Rosnamcha Sanha* (Ex.P.5) and the *Dehati Nalishi* (Ex.P.6) we are of the opinion that the dying declaration is trustworthy to base conviction on it. The certificate of the doctor to the effect that the deceased was conscious while recording the dying declaration and not to the effect that the deceased was in a fit mental condition to give the dying declaration and further the

non examination of the Doctor by the Prosecution makes no difference in the facts and circumstances of this particular case.

(12) Now coming to the last question about the conduct of the accused/appellant, we are of the opinion that since we have held the dying declaration true and trustworthy and we are holding that the appellant was guilty of the offence punishable u/s 302 of the IPC, the question of conduct need not be gone into by this Court.

(13) In the facts and circumstances of this case, we hold that the learned Sessions Judge has rightly convicted the appellant under section 302 of the IPC believing the dying declaration Ex.P.13. This appeal has no merit. The appeal fails and is dismissed. The conviction and sentence awarded to the appellant are upheld and confirmed.

Sd/-
L.C.BHADOO
Judge

11.07.2005

Sd/-
Sunil Kumar Sinha
Judge

11.07.2005